



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CIVIL APPLICATION NO 288 OF 2014

IN THE MATTER OF AN ARBITRATION BETWEEN Y.A SHRETTA AND LEISURE LODGES LIMITED

Y.A.SHRETTA.....APPLICANT

VERSUS

LEISURE LODGES LTDRESPONDENT

RULING

INTRODUCTION

1. The Applicant's Originating Notice of Motion application dated 13th June 2014 and filed on the same date was brought under the provisions of Section 1A, 1B, 1C (sic) and 3A of the Civil Procedure Act, Order 46 Rules 18 and 20 of the Civil Procedure Rules and Section 26 of the Civil Procedure Act. It sought the following orders:-

1. **That this Honourable Court be pleased to enter judgment for the Applicant as follows, in terms of the award made on 29th April 2011 by Mr Daniel Ndonye, Mr Sharad Rao and Mr Mukesh Shah:-**

- a. **THAT the Respondent shall pay to the Applicant Kshs 43,772,599/= which was payable as of 31st December 1999.**
- b. **THAT the Respondent shall pay the Claimant's costs based on the instruction fee of Kshs 43,772,599/= but otherwise calculated on the basis of one half of costs of the arbitration in all other respects.**
- c. **THAT in respect of the US\$ 252,500 paid to the arbitral tribunal in the first instance by the Applicant and the Respondents, the Respondents shall refund the Applicant US\$ 63,125.**
- d. **The costs awarded shall be agreed between the parties within 15 days of the award failing which the same shall be taxed by the court upon application by any one or more parties within the next 30 days.**

2. **That this Honourable Court be pleased to award the Applicant interest on Kshs 43,772,599/= at twenty (20%) per annum from 1st January 2000 until payment.**

3. **That the costs of this application be provided for.**

2. A brief background of this matter is that the Applicant herein had sought variation of the Final Award of Kshs. 43, 772, 599/= that was made on 29th April 2011 on the ground that he had not been awarded any interest on the principal sum. These proceedings were filed in **High Court Miscellaneous Civil Application No 457 of 2011 Y. A. Shretta vs Leisure Lodges Ltd** and **Vadag Establishment**.

3. The Respondent and Vadag Establishments also filed proceedings in **High Court Winding Up Cause No 28 of 1996** and **High Court Miscellaneous Civil Application No 559 of 2011 Vadag Establishment vs Y. A. Shretta and Leisure Lodges Ltd** where they also sought the setting aside of the said Final Award for various reasons. The three (3) applications were consolidated and heard. This court delivered a ruling on 30th May 2014 dismissing all the said applications for the reason that none of the respective applicants had demonstrated sufficient grounds for it to interfere with the findings in the said Final Award.

THE APPLICANT'S CASE

4. Yashvin A. Shretta swore a Supporting Affidavit on 13th June 2014. His written submissions were dated and filed on 21st August 2014. He also filed a List of Authorities that was dated 14th June 2014 and filed on 24th September 2014. His Reply to Submissions were dated and filed on 24th September 2014.

5. It was his case that after the dismissal of the aforesaid applications for setting aside the said Final Award, he was entitled to entry of judgment under Order 46 Rule 18 of the Civil Procedure Rules and to have judgment entered in his favour together with interest at 20% from 1st January, 2000 as he had prayed in his Statement of Claim dated 29th July 2002.

THE RESPONDENT'S CASE

6. Despite having been granted leave to file a Replying Affidavit, the Respondent did not do so. It, however, filed written submissions that were dated 19th September 2014 and filed on 22nd September 2014 and Supplementary written submissions that were dated and filed on 16th October 2014.

LEGAL ANALYSIS

7. The competence of the Applicant's present application was questioned by the Respondent. The court therefore found it prudent to deal with the same right from the outset.

8. The Respondent was emphatic that the Applicant's application was irredeemably bad in law for the reason that Chamber Summons was not a manner prescribed for instituting suits and that it could not be deemed to have been a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder. It was emphatic that the use of the term "summons" in the definition of the term "pleading" must be read to mean "originating summons" as that was a manner prescribed for instituting suits.

9. It placed reliance on the case of **Board of Governors Nairobi School vs Jackson Ileri Geta (1999) KLR** where the Court of Appeal stated as follows:-

"pleading is defined in Section 2 of the Civil Procedure Act to include a petition or summons...this definition, is couched in such a way as to accord with Order IV rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

10. It also referred the court to the case of **Kenya National Federation of Co-operatives Limited vs Econet Wireless Kenya Limited & 3 others (2006) eKLR** wherein Kasango J also took the same position.

11. It was its argument that the said application could not be rescued by Article 159 (2) (d) of the Constitution of Kenya, 2010 or Sections 1A and 1B of the Civil Procedure Act Cap 21 (Laws of Kenya) as the wrong procedure of instituting the proceedings herein could not be deemed to have been a procedural technicality.

12. It further relied on the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others Civil appeal No 290 of 2012** in which the Court of Appeal held as follows:-

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

13. On his part, the Applicant submitted that whilst Order 46 Rule 18 of the Civil Procedure Rules provided for the entry of judgment, it was silent as to how a party was to apply for entry of judgment where an award emanated from a suit or a Winding Up Cause that had been struck out as happened in the Applicant's case. It was his contention that no problem would have arisen if the court had either held that an application could be made in the struck out Winding Up Cause or in an application made under the procedure governed by the Arbitration Act.

14. It was also his submission that it was settled law in Kenya that where a statute conferred a right on a party but failed to prescribe the procedure for enforcing that right, such party could approach the court through any of the procedures by which it was approached.

15. Order 46 Rule 18 of the Civil Procedure Rules makes it abundantly clear that the Applicant was entitled to have judgment entered in his favour after the dismissal of the applications that had been filed to set aside parts of the award or the award in its entirety. That rule reads as follows:

1. **The court shall on request by any party with due notice to other parties enter judgment according to the award—**
 - a. **when no application has been made within the time allowed by rule 17; or**
 - b. **when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or**

c. when an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal.

2. Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

3. Order 49, rule 2 shall apply to the entry of judgment under subrule (1).

16. As was rightly pointed out by the Applicant, Order 46 Rule 1 of the Civil Procedure Rules, 2010 envisages a situation where the application for judgment to be entered is made in the very suit in which a reference was made of the matter to arbitration. That rule reads as follows:

46. 1. Parties to a suit may apply for arbitration

Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

17. In support of his submission, he referred the court to several cases in this regard. In one of the cases, Saint Benoist Plantations Limited vs Jean Emile Adrien Felix (1954) Vol 21 EACA 105, it was stated as follows:-

“I have no doubt myself that where an act of parliament says that an application may be made to the court, that application may be made by motion. In the common law courts before the passing of the Judicature Act the only mode by which the court was approached otherwise than by issue of a writ was a motion. In the High Court of Chancery it is quite true that the summary mode of proceeding was usually made by petition but I see no reason and I have spoken to all my brothers of this Division except one I think whom I have not been able to see and also to the Master of the Rolls, and they all agree with me that in such a case as the present where the act merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the court can be approached. Now there is no question about it that the court can be and frequently is approached by Originating Motion.”

18. The court agreed with the Applicant’s submissions that he had found himself in a unique position in that the arbitration was ordered by the court but the Court of Appeal struck out the Petition pursuant to which the said arbitration was to be undertaken. The court could therefore be approached by the Originating Notice of Motion in a miscellaneous application as it was a manner in which such an action could be commenced as was held in the case of Saint Benoist Plantations Limited vs Jean Emile Adrien Felix(Supra).

19. Appreciably, applicants who seek recognition and enforcement of arbitral awards only need to file a miscellaneous application. The court was therefore not satisfied by the Respondent’s arguments that the Applicant’s present application could only be commenced in the prescribed manner and that an Originating Notice of Motion under Section 1A, 1B and 26 of the Civil Procedure Rules, 2010 was clearly not one of the prescribed way of instituting proceedings in before this court.

20. The court was therefore more persuaded by the Applicant’s submissions in this regard and found that his present application was competent for all purposes and intent. Section 1C of the Civil Procedure Rules was, however, not applicable herein as there is no such provision, a position that was correctly pointed out by the Defendant.

21. Turning to the substantive issues, the Applicant referred the court to several cases where the common thread was that under Section 26 of the Civil Procedure Act, the court had jurisdiction to award interest upon entry of judgment See - Bishan Das Shahi vs I. G. Seth & Another (1964) EA 246 and Ajay I. Shah vs Guilders International Bank Ltd [2003] KLR 269 in this regard.

22. Under the said Section 26 of the Civil Procedure Act Cap 21 (Laws of Kenya), this Honourable Court has jurisdiction to award interest at such rate and for such periods it deems appropriate in the circumstances of any case. The three (3) periods when the court can award interest are before the action is commenced, between the commencement of the action and delivery of judgment and from the date of judgment to the date of payment. The invocation of Section 26 of the Civil Procedure Act by the Applicant was thus proper and applicable herein contrary to what the Respondent had contended in its submissions.

23. The Applicant argued that he was entitled to interest at twenty (20%) per cent with effect from 1st January 2000. In the Final Award, he was not awarded interest as the court did observe in its ruling in 30th May 2014 that awarding of interest was not a term of the reference of the tribunal.

24. In Paragraph 91 of the said ruling, the court had the following to say:-

“The court has no power to re-open the facts of the case on this issue or make an order for the same as had been prayed for by Y.A. Shretta as the Arbitral Award was final and binding upon the parties. The only remedy to Y.A. Shretta would be accrual of interest at court rates once the Arbitral Award is recorded as a judgment of the court. The court agrees with the submissions by both Vadag Establishment and Leisurelodges Limited that it cannot make an award on interest and/or remit the Arbitral Award to the Arbitral Tribunal to award interest to Y.A. Shretta.”

25. As an award of interest by the court is discretionary, unless of course where it is contractual, the court found that the only interest that would be awardable to the Applicant was simple interest at court rates from the date of entry of judgment herein. Notably, interest would not

have been payable from the date of Final Award as the Applicant had made an application to have the said Award remitted. Judgment could not therefore have been entered until all the applications under Order 46 Rules (13), (14), (15) and (16) of the Civil Procedure Rules were determined.

26. Once the court entered judgment under Order 46 Rule 13 of Civil Procedure Rules, it could make such orders on the issue of costs. Unless there was an order of the court, time could not be said to be running. The court would not wish to delve into the issues of how the costs shall be refunded as that is within the ambit of what the Arbitral Tribunal or taxing master ought to do.

27. The court was thus not persuaded by the Respondent's submissions that the Applicant's prayer for costs had lapsed for the reason that the Applicant had neither timeously abided with the timelines that had been imposed by the Tribunal nor had he applied for their extensions.

28. Having considered the pleadings, affidavit evidence, written submissions and case law in respect of the parties' respective cases, the court was more persuaded by the Applicant's submissions that judgment could be entered in favour of the Applicant in terms of the Final Award dated 29th April 2011.

DISPOSITION

29. Accordingly, the upshot of this court's in respect of the Applicant's Originating Notice of Motion dated and filed 13th June 2014 is as follows:-

- a. Prayer No 1 (a) of the said application is hereby granted.
- b. Interest shall be at court rates from date of entry of judgment until payment in full.
- c. Parties are hereby directed to agree on costs within thirty (30) days from the date of this ruling failing which the costs shall be taxed by the Arbitral Tribunal and if it cannot be constituted for any reason within fourteen (14) days of such request having been made to the Arbitral Tribunal by any party with notice to the other party of such intention to have the costs taxed by the Arbitral Tribunal, the said costs shall be taxed by the Taxing Master who shall quantify the costs in Prayer No (1) (b) of the said application and deal with Prayer No (1) (c) of the said application in his or her decision.
- d. In the event that it shall be the Taxing Master who shall tax the costs, he shall bear in mind the provisions of Order 46 Rule 13 of Civil Procedure Rules that he can only make an award of costs save to the extent an award of costs has been properly made by the Arbitral Tribunal that made its Final Award on 29th April 2011.

30. The Respondent shall bear the Applicant's costs of this Application.

31. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 12th day of February 2015

J. KAMAU

JUDGE